

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
ASSIGNED ON BRIEFS MAY 29, 2007

**VICKIE KAY MOORE v. VICK MOORE**

**Direct Appeal from the Chancery Court for Bedford County**  
**No. 24,732 J. B. Cox, Chancellor**

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**No. M2004-00394-COA-R3-CV - Filed on August 29, 2007**

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This appeal arises out of post-divorce proceedings. The final decree of divorce and marital dissolution agreement required the husband to refinance the parties' marital residence within thirty days of the decree, and to pay the wife \$15,000 for her equity in the residence. Approximately two months after the decree was entered, the wife filed a petition to show cause alleging that the husband had not refinanced the home or paid her for the equity. The trial court entered an order finding the husband in contempt, but it did not find that the husband had willfully failed to meet his obligations. The court also ordered the husband to pay the wife's attorney's fees. We reverse in part and affirm in part.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed in Part  
and Reversed in Part**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Ted W. Daniel, Murfreesboro, TN, for Appellant

Megan A. Kingree, Shelbyville, TN, for Appellee

**OPINION**

**I. FACTS & PROCEDURAL HISTORY**

Vick Moore ("Husband") and Vickie Moore ("Wife") were divorced by decree on September 12, 2003. The final decree of divorce divided the parties' marital property and provided, in part:

**Real Property.** The parties agree that husband will keep the marital residence, assuming the indebtedness thereon and holding wife

harmless on same, and wife agrees to convey her interest in said property to husband upon the husband paying her \$15,000.00 for her equity in the real estate. Husband will refinance the marital residence in his name alone within thirty (30) days from the entry of this decree.

The parties also executed a marital dissolution agreement (“MDA”) containing a provision entitled “Real Property” that was identical to the one in the divorce decree. The MDA further provided:

**Non-Compliance.** Should either party incur any expense or legal fees as a result of the breach of any portion of this Divorce Settlement Agreement by the other party, the Court shall award reasonable attorney’s fees and suit expenses to the non-defaulting party.

On November 20, 2003, Wife filed a petition to show cause alleging that Husband had not refinanced the marital residence within the thirty-day time period provided in the order, and he had not paid her \$15,000 for her equity in the property. She requested the court to order a sale of the residence if Husband did not provide proof of refinancing within five days, and she sought reasonable attorney’s fees.

Following a hearing on December 19, 2003, at which Husband proceeded *pro se*, the trial court entered an order on January 2, 2004, which included the following findings:

1. [Husband] is found to be in contempt of court for failure to refinance the residence and to pay [Wife] the sums due to [Wife] pursuant to the Marital Dissolution Agreement and final Decree of Divorce previously entered in this cause. It is further found, however, that said contempt was not willful, in that [Husband] made attempts to refinance the residence.
2. [Husband] shall have ninety (90) days from the entry of this Order within which to refinance the residence and pay [Wife] in full. In the event that the refinance and payment are not made within said 90-day period, the residence shall be immediately placed on the market for sale to satisfy said indebtedness.
3. Costs and attorney fees, as shown on the attached Affidavit of Counsel, are assessed against [Husband], for which execution may issue.

The attached affidavit reflected that Wife had incurred \$815.00 in attorney’s fees and costs to be paid by Husband.

Husband then retained counsel and filed a motion to alter or amend the judgment on January 5, 2004, alleging error in the trial court’s finding of contempt because the court specifically found

that his failure to refinance was not willful. Husband also challenged the award of costs and attorney's fees to Wife.

Following a hearing on the motion, the trial court altered its final order as follows:

1. The Order entered January 2, 2004 shall be amended to delete the entire second sentence of paragraph one and replace with the following: "Due to the proof of attempts made by [Husband], the Court in exercising its discretion, hereby refrains from any punishment for said contempt other than that provided in paragraph three."
2. That the costs of filings in this matter shall be borne by the attorneys filing said pleadings and all attorney fees for filing said motions borne by the respective attorneys.<sup>1</sup>

Based on this amendment, the final order's first paragraph would provide:

[Husband] is found to be in contempt of court for failure to refinance the residence and to pay [Wife] the sums due to [Wife] pursuant to the Marital Dissolution Agreement and final Decree of Divorce previously entered in this cause. Due to the proof of attempts made by [Husband], the Court in exercising its discretion, hereby refrains from any punishment for said contempt other than that provided in paragraph three.

Husband filed a timely notice of appeal on February 6, 2004.

## **II. ISSUES PRESENTED**

Husband presents the following issues for review:

1. Did the trial court err by entering a judgment for contempt, when the failure to refinance the parties' home was not wilful?
2. Did the trial court err by awarding attorney fees, since there can be no contempt without willfulness?

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<sup>1</sup> After the motion to alter or amend was filed, the parties' attorneys' inability to agree on the aspects of the trial court's oral ruling and what exactly transpired at the hearings resulted in many additional filings and a lengthy delay in this case reaching us on appeal. There have been allegations of overreaching in drafting an order, a motion for sanctions, a motion for dismissal of this appeal based upon alleged fraud and misrepresentation, and they could not agree on a statement of the evidence to be submitted to this Court. This conduct likely led the trial court to assess the post-trial costs and fees to the attorneys. It does not appear that Husband was ordered to pay any fees beyond the \$815.00 awarded to Wife in the original order.

3. Did the trial court err by awarding attorney fees, since Tenn. Code Ann. § 29-9-105 only authorizes the award of attorney fees as damages in cases that consist of “the performance of a forbidden act”?

For the following reasons, we reverse the decision of the chancery court in part, and we affirm in part.

### III. STANDARD OF REVIEW

On appeal, a trial court’s factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (2006); **Bogan v. Bogan**, 60 S.W.3d 721, 727 (Tenn. 2001). For the evidence to preponderate against a trial court’s finding of fact, it must support another finding of fact with greater convincing effect. **Watson v. Watson**, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). We review a trial court’s conclusions of law under a *de novo* standard upon the record with no presumption of correctness. **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

### IV. DISCUSSION

#### A. Contempt

On appeal, Husband first argues that the trial court erred in finding him in contempt when the court also found that his failure to refinance the residence was not willful.

An act of contempt is a willful or intentional act that offends the court and its administration of justice. **Ahern v. Ahern**, 15 S.W.3d 73, 78 (Tenn. 2000). Tenn. Code Ann. § 29-9-102 (2000) provides:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases: . . . (3) The willful disobedience or resistance of any . . . party . . . or any other person, to any lawful writ, process, order, rule, decree, or command of such courts; . . . .

Thus, to find contempt, a court must find the misbehavior, disobedience, resistance, or interference of the party to be willful. **Ahern**, 15 S.W.3d at 79. In making a threshold finding of willful conduct, “willfulness” consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. **State ex rel. Flowers v. Tenn. Trucking Ass’n Self Ins. Group Trust**, 209 S.W.3d 602, 612 (Tenn. Ct. App. 2006) (citing *United Color Lab & Digital Imaging, Inc. v. United Studios*, No. W2005-00133-COA-R3-CV, 2006 WL 694645, at \*4 (Tenn. Ct. App. Jan. 18, 2006)). A person acts willfully if he or she is a free agent, knows what he or she is doing, and intends to do what he

or she is doing. *Id.* A finding of willful conduct must precede a judgment for contempt, and a finding by a court that an act or omission was not willful must preclude a judgment of contempt. *Haynes v. Haynes*, 904 S.W.2d 118, 120 (Tenn. Ct. App. 1995).

Holding an individual in contempt is an available remedy “only when the individual has the ability to comply with the order at the time of the contempt hearing.” *Ahern*, 15 S.W.3d at 79. For example, for a court to find that a party’s failure to pay alimony was contemptuous, the court must first determine that the party had the ability to pay the obligation, and then determine that the failure to pay was willful. *See id.* It is often said that the party held in civil contempt holds the “keys to the jail” because he may purge himself of contempt by complying with the court order. *Id.*

In this case, the trial court held Husband in contempt for his failure to refinance the marital residence within thirty days and his failure to pay Wife \$15,000 for her equity in the home. We do not have a transcript or statement of the evidence in the record before us, but the trial court’s final order initially contained an express finding that “said contempt was not willful, in that [Husband] made attempts to refinance the residence.” The amended order deleted and restated this sentence, but it again referred to the “proof of attempts made by [Husband]” to refinance the home, when explaining the court’s decision not to impose punishment for the contempt. More importantly, it appears that there was never a finding that Husband willfully disobeyed the trial court’s order in failing to refinance the home or in failing to pay Wife for her equity in the home. Without a threshold finding of willfulness, the trial court erred in holding Husband in contempt. *See Haynes*, 904 S.W.2d at 118 (vacating trial court’s order that stated “father is in contempt . . . ; however, said contempt is not willful”). Therefore, we reverse the chancery court’s order to the extent that it finds Husband in contempt.

### ***B. Attorney’s Fees***

Next, Husband argues that the trial court erred in awarding Wife her attorney’s fees because the finding of contempt was erroneous, or alternatively, because attorney’s fees are only recoverable when the contempt consists of the “performance of a forbidden act” pursuant to Tenn. Code Ann. § 29-9-105 (2000). Wife claims that the trial court was authorized to award her attorney’s fees pursuant to the MDA, even if the finding of contempt was erroneous. Again, the MDA included the following provision:

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**Non-Compliance.** Should either party incur any expense or legal fees as a result of the breach of any portion of this Divorce Settlement Agreement by the other party, the Court shall award reasonable attorney’s fees and suit expenses to the non-defaulting party.

The trial court’s final order awarded attorney’s fees and costs to Wife, without stating the basis for the award. The amended order stated that the court “refrains from any punishment for said contempt other than that provided in paragraph three,” which addressed attorney’s fees.

Because we have reversed the trial court's finding of contempt, any award of attorney's fees due to that finding was also erroneous.<sup>2</sup> However, Wife was entitled to recover her attorney's fees pursuant to the MDA, therefore, we affirm the award of attorney's fees.<sup>3</sup>

In the absence of an agreement between the parties, the decision of whether to award attorney's fees in a divorce or post-divorce proceeding is largely in the discretion of the trial court, and we will not interfere on appeal except upon a clear showing of abuse of that discretion. **Hogan v. Yarbrow**, No. 02A01-9905-CH-00119, 1999 WL 1097983, at \*4 (Tenn. Ct. App. W.S. Oct. 5, 1999) (citing *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)). However, where a marital dissolution agreement contains a provision governing the payment of attorney's fees, the interpretation of that provision is a matter of law that we review *de novo*. **Id.** The language of a fee provision is subject to the usual rules of contract interpretation, and the award of such fees is limited to the situation agreed to by the parties. **Segneri v. Miller**, No. M2003-01014-COA-R3-CV, 2004 WL 2357996, at \*6 (Tenn. Ct. App. Oct. 19, 2004). When the contract provides for the recovery of attorney's fees in a certain situation, the trial court has no discretion regarding whether to award attorney's fees or not. **Seals v. Life Investors Ins. Co. of America**, No. M2002-01753-COA-R3-CV, 2003 WL 23093844, at \*4 (Tenn. Ct. App. Dec. 30, 2003) (citing *Hosier v. Crye-Leike Commercial, Inc.*, No. M2000-01182-COA-R3-CV, 2001 WL 799740, at \*6 (Tenn. Ct. App. July 17, 2001)). Determining the reasonableness of the amount of an attorney's fee is a discretionary inquiry by the trial court, however, to which appellate courts will defer, absent an abuse of discretion. **Keith v. Howerton**, 165 S.W.3d 248, 250-51 (Tenn. Ct. App. 2004) (citing *Killingsworth v. Ted Russell Ford*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002)).

Here, pursuant to the MDA provision, Wife was entitled to recover the attorney's fees that she incurred as a result of Husband's breach of the MDA provisions. We affirm the award of \$815.00 in attorney's fees and costs to Wife, which we find to be reasonable.

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<sup>2</sup> Husband is correct in noting that Tenn. Code Ann. § 29-9-105 only authorizes the payment of damages, which may include attorney's fees, when a finding of contempt was based on the performance of a forbidden act. Tenn. Code Ann. § 29-9-105 (2000) states: "If the contempt consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and person in status quo, *or by the payment of damages.*" (emphasis added).

<sup>3</sup> If the chancellor reached the correct result for the wrong reason, we may still affirm the order on a proper basis. **Allen v. Nat'l Bank of Newport**, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992).

## **V. CONCLUSION**

For the aforementioned reasons, we reverse the decision of the chancery court in part, and we affirm in part. Cost of this appeal are taxed one-half to the appellant, Vick Moore, and his surety, and one-half to the appellee, Vickie Moore, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE